IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BURTON,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
PENNSYLVANIA BOARD OF PROBATION & PAROLE, et al.,	:	
	:	
Defendants.	:	No. 02-2573

MEMORANDUM

Stengel, J. December 20, 2004

James Burton filed this civil rights action against the Pennsylvania Board of Probation & Parole, Edward Jones, and Daniel Solla. Burton, who was previously employed by the Board, presents discrimination, hostile work environment, and retaliation claims against the Board and Jones and Solla, two of the Board's supervisors. On February 14, 2003, the defendants filed a motion for summary judgment against Burton, arguing, among other things, that Burton's hostile work environment and retaliation claims should be dismissed. For the reasons discussed below, I will grant the defendants' motion.

I. BACKGROUND

Burton filed this action in state court on or about March 30, 2002 under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., the Pennsylvania Human Relations Act, 43 Pa.C.S.A. § 951, et seq. ("the PHRA"), the Civil Rights Act of 1866, 42 U.S.C.

§ 1981, as well as state tort law.[1] The defendants removed the case to the United States District Court for the Eastern District of Pennsylvania on April 29, 2002.

In the complaint, Burton alleged that he is a black male who was hired by the Board in or about December 1990. In or about January 1997, Burton was promoted to parole supervisor. From approximately January 2000 until his alleged constructive discharge in March 2001, Burton was the only black male in that position. Solla is deputy director at the Board and was Burton's immediate supervisor. Jones is a district director at the Board.

On May 10, 2000, Burton underwent angioplasty surgery. In or about August 2000, Solla issued a written reprimand of Burton for failing to "follow up on a case." Burton claims this blocked him from consideration of future potential promotions. White supervisors were allegedly not disciplined for the same infraction.

The complaint stated, without reference to specific dates, that "at one point" Burton was assigned almost twice the number of cases as his coworkers. When Burton discussed his concern over this uneven case assignment with Solla, Solla responded by giving Burton the "most problematic" cases. No approximate date was alleged with respect to this conversation. The complaint also asserted, again without reference to dates, that Solla would discipline Burton without first discussing his performance informally, not provide the same one-on-one supervision that he offered to the other supervisors, and place post-it notes on the door (presumably of Burton's office) if Burton was more than one minute late to work in the morning while white

[1] Burton filed a complaint with the Pennsylvania Human Relations Commission on January 19, 2001 and received his right to sue letter on December 31, 2001. Burton's state charge of discrimination was forwarded to the EEOC, and Burton was notified of the dual filing on February 28, 2001.

supervisors were not similarly rebuffed.

In October 2000, Burton spoke with Solla concerning a tee-shirt "frequently" worn by a Board agent which read: "Officer Danny Faulkner was murdered by Mumia Abu-Jamal who shouldn't be in an 8 x 10 foot cell. He should be 6 feet closer to hell." Burton explained to Solla that this shirt was offensive to many black employees, particularly when it was worn while advising parolees. Solla responded that there was nothing wrong with the tee-shirt and would not tell the employee that he could not wear the tee-shirt to work.

On May 14, 2002, the defendants filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). On June 13, 2002, the Honorable Lowell A. Reed, Jr. granted the defendants' motion in part with leave to amend one dismissed claim and denied the motion in part. Burton v. Pennsylvania Bd. of Probation & Parole, 2002 WL 1332808 (E.D.Pa. June 13, 2002).

Specifically, Judge Reed granted the motion to dismiss counts one, three, and four of the complaint to the extent that those counts asserted a claim for hostile work environment under Title VII, the PHRA, and Section 1981. According to Judge Reed, Burton failed to allege severe or pervasive conduct. "His allegations are rather in the nature of disproportionate work assignments and unfair reprimands. The tee-shirt incident, even if legally offensive, is an isolated incident." Id. at *3. However, Judge Reed stated that Burton could raise this claim in an amended complaint if the facts permitted. Id.

Judge Reed denied the motion to dismiss counts one, three, and four to the extent that those counts asserted a claim for constructive discharge under Title VII, the PHRA, and Section 1981 and denied the motion to dismiss counts two, three, and four to the extent that those counts

asserted a claim for retaliation under Title VII, the PHRA, and Section 1981. According to Judge Reed, under the "liberal pleading standards," Burton stated a claim for constructive discharge and retaliation. Id. at *4-6.

The court granted the motion to dismiss counts five and six for intentional and negligent infliction of emotional distress, respectively. The court stated that Commonwealth agencies and their employees are protected from the imposition of liability for intentional torts. Id. at *6. Burton's negligent infliction of emotional distress claim, which was based on his discrimination claims, was defective because in order to sustain it, Burton must prove the underlying discrimination, "and Title VII discrimination is an intentional, not negligent, act." Id. at *7.

The court denied the motion for Jones and Solla to be granted immunity for acts committed in their individual capacities as alleged under the PHRA in count four because qualified immunity is not available to shield individual defendants sued in their individual capacities from PHRA claims. Id. at *7 n.11. However, the court granted the motion for Jones and Solla to be granted immunity for acts committed in their individual capacities as alleged under Title VII in count two because under Title VII, a public official may be sued only in his official capacity. Id. at *7.

Judge Reed granted the motion for Jones to be granted qualified immunity under Section 1981 in count three because under Section 1981, an individual who is personally involved in alleged discrimination and intentionally caused or authorized, directed, or participated in the alleged discriminatory conduct can be held liable, and the complaint did not assert that Jones was responsible for a single affirmative act. Id. However, Judge Reed allowed Burton to amend his complaint "if the facts permit[ted]." Id. Finally, Judge Reed denied the motion for Solla to be

granted qualified immunity under Section 1981 in count three because, according to the complaint, Solla personally and intentionally caused the alleged discrimination. Id.

On July 15, 2002, Burton filed an amended complaint, adding, among other things, that: on "at least two occasions," Solla referred to him "in a derogatory fashion as 'Jim Bo', which was a term used in reference to African American male slaves"; on "several occasions," Burton complained to Jones about the uneven case assignment, but Jones concurred with Solla's actions; on "approximately ten occasions," Burton complained about the excessive caseload to Tom Costa, a regional director of the Board, but Costa "perpetuated the situation"; Burton was required to perform menial, clerical tasks, including taking mail to the post office, while white supervisors were not; higher performance standards were imposed on Burton's unit, and Burton's unit was under constant scrutiny by his superiors; and, at "one point," Burton's agents reported directly to Solla because Solla had demeaned Burton to the point that Burton was no longer treated as a supervisor by his superiors or subordinates. The amended complaint indicated that Jones was responsible for these incidents.

On August 14, 2002, Burton filed a revised amended complaint, specifying that his Title VII claims were against the Board as well as Jones and Solla in their "official" capacities and dropping the claims for intentional and negligent infliction of emotional distress. This case was reassigned to the Honorable Timothy J. Savage and later reassigned to me. On February 14, 2003, the defendants filed a motion for summary judgment, contending that Burton's hostile work environment and retaliation claims should be dismissed. Jones and Solla further contend

that even if this court does not dismiss those claims, they are entitled to qualified immunity.[2]

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The moving party bears the initial burden of showing that there is no genuine issue of material fact. Highlands Ins. Co. v. Hobbs Group LLC, 373 F.3d 347, 350-51 (3d Cir. 2004). Once the moving party has carried its burden, the nonmoving party must come forward with specific facts to show that there is a genuine issue for trial. Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). A fact is "material" if its resolution will affect the outcome under the applicable law, and an issue about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must draw all justifiable inferences in favor of the nonmoving party. Highlands Ins. Co., 373 F.3d at 351.

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[2] I note that Burton also raises a discrimination claim. Pl.'s Mem. Opp. Summ. J., at 1-2 ("Plaintiff makes the following claims: Count I (Discrimination and hostile environment under Title VII); Count II (Retaliation under Title VII); Count III (Discrimination and retaliation under Section 1981); and Count IV (Discrimination, retaliation and hostile environment under Pennsylvania Human Relations Act)."). In order to establish a prima facie case of discrimination, a plaintiff must show that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. See Jones v. School District of Philadelphia, 198 F.3d 403, 410-11 (3d Cir. 1999). If the plaintiff establishes a prima facie case, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employee's rejection." Id. at 410. If the defendant carries this burden, the plaintiff must then show that these reasons were a pretext for discrimination. Id. The defendants do not address Burton's discrimination claim in their motion for summary judgment. Accordingly, I need not determine whether the discrimination claim must be dismissed or whether Solla and Jones are entitled to qualified immunity with respect to that claim.

III. DISCUSSION

Employer liability under the PHRA "follows the standard applied under Title VII." Knabe v. Boury Corp., 114 F.3d 407, 410 n.5 (3d Cir. 1997). Moreover, the legal standard for a Section 1981 case is identical to the standard in a Title VII case. See Lewis v. University of Pittsburgh, 725 F.2d 910, 915 n.5 (3d Cir. 1983). This discussion applies equally to Burton's PHRA and Section 1981 claims.

A. Retaliation Claim

To establish a prima facie case of retaliation, a plaintiff must demonstrate that: (1) he engaged in a protected activity; (2) the employer took an adverse action against him after or contemporaneous with the protected activity; and (3) there is a causal link between the activity and the adverse action. Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997).

1. Whether Burton Engaged in a Protected Activity

"Protected activity" includes formal charges of discrimination as well as informal protests of discriminatory employment practices, such as making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of co-workers who have filed formal charges. Abramson v. William Patterson College of New Jersey, 260 F.3d 265, 287-88 (3d Cir. 2001). An employee need not prove that the conduct about which he is complaining is actually in violation of anti-discrimination laws; rather, he only has to have a good faith, reasonable belief that the complained of conduct was unlawful. Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996).

Here, Burton has presented evidence that he made informal protests of discrimination.

According to Burton, he complained to Solla in February 2000 that the Mumia Abu-Jamal tee-shirt worn by a white Board agent was racially offensive. Pl.'s Mem. Opp. Summ. J., Ex. A. Moreover, Burton complained on "several occasions" to Solla that he received a higher number of cases than his white colleagues. Id. Accordingly, I find that Burton has provided sufficient evidence that he engaged in a protected activity.[3]

2. Whether the Defendants Took an Adverse Action Against Burton

An action is "adverse" only if it alters the employee's compensation, terms, conditions, or privileges of employment, deprives him of employment opportunities, or adversely affects his status as an employee. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). Not everything that makes an employee unhappy qualifies as an adverse action; otherwise, minor actions that an irritable employee does not like would form the basis of a discrimination lawsuit. Id. Only employment decisions that have a material adverse impact on the terms or conditions of employment are actionable. Id.

Here, Burton has presented evidence that he received a written reprimand in August 2000 that prevented him from being promoted. Pl.'s Mem. Opp. Summ. J., Ex. A. The Third Circuit has previously indicated that being denied a promotion may constitute an adverse action. Weston v. Pennsylvania, 251 F.3d 420, 431 (3d Cir. 2001) (indicating that a demotion, change in work schedule, reassignment to different position or location, change in hours or work, or denial of pay

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[3] Burton also states that he complained to Solla about the problem employees assigned to his unit. Pl.'s Mem. Opp. Summ. J., at 12 (citing Def.'s Mem. Supp. Summ. J., Ex. 5). Moreover, Burton states that he complained to Solla that his unit did not receive any clerical support. Id. (citing Def.'s Mem. Supp. Summ. J., Ex. 4 and Pl.'s Mem. Opp. Summ. J., Ex. O). However, Burton has not presented evidence that he complained to Solla that he was assigned the problem employees and did not receive any clerical support because of his race. Accordingly, neither of these complaints can be considered protected activity.

raise or promotion may constitute an adverse action). Accordingly, viewing the record in the light most favorable to Burton, I find that there is sufficient evidence that the defendants took an adverse action against Burton.[4]

3. Whether There Is a Causal Link Between the Protected Activity and the Adverse Action

Timing alone can be sufficient to establish the necessary causal link between the protected activity and the adverse action when it is "unusually suggestive." Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000); see Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989) (finding that the plaintiff established sufficient evidence of causation by showing that the adverse action occurred only two days after the protected activity). Absent "unusually suggestive" timing, however, timing, taken alone, is generally insufficient to establish the causal link. Farrell, 206 F.3d at 280. In such circumstances, courts may look for other evidence from which a causal connection can be inferred. Id. at 280-81.

In this case, the most specific date Burton provides as to when he engaged in a protected

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[4] Burton also states that the defendants denied him clerical support, requiring Burton to perform clerical tasks, such as taking out the mail. Id. As I indicated above, only employment decisions having a material adverse impact on the terms or conditions of employment are actionable. Robinson, 120 F.3d at 1300, supra. Requiring an employee to take out the mail clearly does not constitute an employment decision having a material adverse impact on the terms or conditions of employment. Accordingly, such a requirement cannot be considered an adverse action.

Burton also indicates that his constructive discharge in March 2001 was an adverse action. A constructive discharge occurs if the "conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." Goss v. Exxon Office Systems Co., 747 F.2d 885, 887-88 (3d Cir. 1984). The necessary predicate to a showing of a constructive discharge is a showing of a hostile work environment. Konstantopoulos v. Westvaco Corp., 112 F.3d 710, 718 (3d Cir. 1997). Because I find that Burton has not demonstrated a hostile work environment, Section III(B), infra, I find that Burton has not established that he was constructively discharged.

activity is February 2000, when he complained to Solla about the Mumia Abu-Jamal tee-shirt. Moreover, the most specific date Burton provides regarding when the defendants took an adverse action against him is August 2000, when he received the written reprimand. This six-month time gap is certainly not unusually suggestive of a causal link between the complaint about the tee-shirt and the reprimand. Furthermore, Burton has not provided evidence linking either of the protected activities, i.e., the complaint about the tee-shirt or the complaint about the higher caseload, with the written reprimand. Accordingly, I find that Burton has not presented a prima facie case of retaliation and that this claim must be dismissed.

B. Hostile Work Environment Claim

The defendants argue that Burton's hostile work environment claim should be dismissed because the alleged harassing behavior was not sufficiently severe or pervasive. The defendants note that Judge Reed previously dismissed this claim because Burton failed to allege such conduct by the defendants. Although Judge Reed allowed Burton to raise this claim again if the facts permitted, the defendants argue that Burton continues to base this claim on conduct that is not severe or pervasive.

To establish a prima facie case of hostile work environment, a plaintiff must show that: (1) he suffered intentional discrimination because of his membership in a protected class; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected him; (4) the discrimination would have detrimentally affected a reasonable person in the same position; and (5) the existence of respondeat superior liability. West v. Philadelphia Electric Co., 45 F.3d 744, 753 (3d Cir. 1995). To establish a hostile work environment, a plaintiff must show harassing behavior "sufficiently severe or pervasive" to alter the conditions of his employment.

Pennsylvania State Police v. Suders, --- U.S. ---, 124 S.Ct. 2343, 2347 (2004). A court must consider the totality of the circumstances when determining whether the alleged harassment is sufficiently severe or pervasive to constitute a hostile work environment. Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990). Factors which may indicate a hostile work environment include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

Here, Burton indicates that his hostile work environment claim is based on not being invited to lunches and having to perform clerical work, such as taking out the mail. Burton has also indicated that this claim is based on: the written reprimand; Solla rejecting his complaint about the Mumia Abu-Jamal tee-shirt; Solla referring to him as "Jim Bo" on "two to three occasions"; Solla placing post-it notes marked "late" on his office door on "at least three occasions"; Burton's large caseload; and the assignment of problem employees to Burton's unit.

In Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3d Cir. 1996), the Third Circuit found that the plaintiffs, who were black, provided sufficient evidence of severe or pervasive conduct for a hostile work environment claim based on conduct far more egregious than the conduct in this case. For seven years, the Aman plaintiffs were referred to as "another one," "one of them," "that one in there," and "all of you"; other black employees were harassed on a daily basis by white employees, who hurled insults such as "don't touch anything" and "don't steal"; the plaintiffs were subjected to apparently false accusations of favoritism, incompetence, and were made to do menial jobs; several employees refused to deal with one of the plaintiffs; a

supervisor stated that if things were not resolved with one of the plaintiffs, "we're going to have to come up there and get rid of all of you"; another supervisor told one of the plaintiffs that he knew all about three black employees; a supervisor stated that "the blacks are against the whites"; one of the plaintiff's time cards were stolen; other employees physically snatched things from one of the plaintiffs; one of the plaintiffs was falsely accused of wrongdoing on at least two occasions; a supervisor yelled at one of the plaintiffs on a daily basis; after the plaintiffs began complaining about racial discrimination, employees were asked to keep complaint lists about one of the plaintiffs; and a supervisor withheld relevant financial information about one of the plaintiffs and gave her orders that directly contradicted orders from another supervisor and company policy. Id. at 1083-84.

In Cardenas v. Massey, 269 F.3d 251 (3d Cir. 2001), the Third Circuit found that the plaintiff, a Hispanic, provided sufficient evidence of severe or pervasive conduct for a hostile work environment claim based on conduct that, again, far exceeded the conduct alleged in this case. The supervisor in Cardenas regularly called the plaintiff the "boy from the barrio"; the supervisor asked the plaintiff why he had anglicized his name and regularly dealt with professional disagreements by questioning whether the plaintiff intended to pull out a switchblade; the plaintiff found derogatory anonymous messages on the marker board in his cubicle, one of which used the word "mojado," which means "wetback"; the supervisor consistently gave the plaintiff lower performance evaluations than white employees; another supervisor assigned minorities and trainees disproportionately to the plaintiff's unit; the other supervisor tarnished the plaintiff's reputation by spreading the word that he was an affirmative-action hire; and the supervisors collectively impeded the plaintiff's job performance through

knowingly contradictory instructions and assignments incompatible with the plaintiff's staff resources. Id. at 258-63. According to the Cardenas court, "Although [the plaintiff] may not have presented as much evidence as did plaintiffs in other hostile workplace environment cases, we cannot conclude that he has not presented enough evidence to make a genuine issue of material fact." Id. at 263.

In this case, Burton has provided significantly less evidence of severe or pervasive conduct than was provided in Cardenas, let alone in Aman. Burton has only provided evidence of "two to three" arguably racist remarks, i.e., the "Jim Bo" references. He has not provided any evidence of physically threatening conduct. Moreover, the court finds it doubtful that the other alleged mistreatment, i.e., not being invited to lunches, having to take out the mail, the written reprimand, the rejection of the complaint about the Mumia Abu-Jamal tee-shirt, the posting of the notes marked "late" on Burton's office door on a few occasions, the large caseload, and the assignment of problem employees to Burton's unit, constitutes conduct that is sufficiently severe or pervasive to make out a prima facie case of a hostile work environment. Accordingly, in light of Cardenas and Aman, I find that this claim must be dismissed.[5]

IV. CONCLUSION

Although Burton has provided evidence that he engaged in a protected activity and that the defendants took an adverse action against him, Burton did not establish a causal link between the protected activity and the adverse action. Accordingly, I find that Burton's retaliation claim must be dismissed. Moreover, because Burton has not provided sufficient evidence of severe or

[5] Because I have found that Burton's retaliation and hostile work environment claims must be dismissed, I need not determine whether Solla and Jones are entitled to qualified immunity with respect to these claims.

pervasive conduct by the defendants, Burton's hostile work environment claim must be dismissed. The defendants did not move for summary judgment on Burton's discrimination claim; therefore, that claim remains. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BURTON,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
PENNSYLVANIA BOARD OF	:	
PROBATION & PAROLE, et al.,	:	
	:	
Defendants.	:	No. 02-2573

ORDER

AND NOW, this 20th day of December, 2004, upon consideration of the defendants' motion for summary judgment, and replies thereto, it is hereby ORDERED that said motion is GRANTED. The plaintiff's retaliation and hostile work environment claims are DISMISSED. The plaintiff's discrimination claim remains.

/s/
LAWRENCE F. STENGEL, J.